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Senate

Statement of Senator Dianne Feinstein

"Judicial Nominations"

Mrs. FEINSTEIN: Mr. President, I speak today as a member of the Judiciary Committee for the past 12 years. In this capacity, I have worked with members from both sides of the aisle, and on nominations from both Democratic and Republican Presidents. In all, I have voted to confirm 573 judges, and voted "No" on the Senate floor on 5, and voted against cloture on 11.

I evaluate each candidate on a case by case basis and thoroughly examine their writings, opinions, statements, temperament, and character. The fact that federal judges are lifetime appointments weighs heavily. They do not come and go with an Administration, as do Cabinet appointments; rather, they cannot be removed from the bench except in extremely rare circumstances. In fact, in our government's over 200 year history only 11 federal judges have been impeached, and of those only two since 1936.

Over the years we have had heated debates and strong disagreements over judicial nominees. However, that debate is what ensures the Senate confirms the best qualified candidates. I am deeply troubled when our legitimate differences over an individual's qualifications to be given a lifetime appointment to the federal bench become reduced to inflammatory rhetoric. I am even more concerned when rhetoric turns into open discussions about breaking Senate rules and turning the Senate into a body where might makes right.

I am here today because some members on the other side of the aisle have decided that despite a Constitution that is renowned world-wide and used as a model for emerging democracies; despite a confirmation rate of 95% of President Bush's judicial nominees; and despite the other pressing priorities that the American people want us to address, that the time has come to unravel our government's fundamental principle of checks and balances.

The majority has decided the time has come to unravel the Senate's traditional role of debate; and that the time has come to break the rules and discard Senate precedent.

I am very concerned about this strategy. It is important to remember that once done, once broken, it will be hard to limit and hard to reverse.

In fact, just last month Senator Coleman stated on CNN, "The president has a right to make appointments. They are not to be filibustered. They deserve an up or down vote. That's true for any kind of appointee, whether it's undersecretary of state or a judge." And this is exactly my point. First the rules would be broken with regard to judicial nominees, then it is executive branch nominees, then it is legislation, and then the Senate has no rules at all and simply becomes a replication of the House of Representatives.

Every Thursday morning, I have a constituent breakfast, and at that breakfast I describe the difference between the House and Senate based on something George Washington once said, that the House moves rapidly, is controlled totally by the party in power, and is akin to a cup of coffee. You drink your coffee out of the cup, but if it is too hot, you pour it into the saucer to cool it. And that is the Senate, the greatest so-called deliberative body on Earth, a place that fosters debate, often unlimited, and is basically based on the fact that no legislation is better than bad legislation. So the Senate by design was created to be a very different house than the House of Representatives.

The strategy of a nuclear option will turn the Senate into a body that could have its rules broken or changed at any time by a majority of Senators unhappy with any position taken by the minority. As I said, this is not the Senate envisioned by our Founding Fathers, and it is not the Senate in which I have been proud to serve for the past 12 years.

I think it is important to take a look at history, as others have done, to understand the context of where this debate is rooted. The Founding Fathers and early Pilgrims were escaping a tyrannical government where the average man, the common man, often did not have a voice and was often left without any say in its laws that governed him and his family. In response, these men specifically embedded language in the Constitution to provide checks and balances so that, inherent in our government's design, would be conflict and compromise, and it is precisely these checks and balances that have served to guarantee our freedoms for over 200 years.

When you read the Federalist papers, discussions at the Constitutional convention, and about the experience of America's first President, it is clear the

Senate was never intended to simply be a rubberstamp.

While it is often difficult to discern the original intent of a constitutional provision, the records of the Convention address the role of the Senate in the selection of federal judges with unusual clarity.

Both the text of the Appointments Clause of the Constitution and the debates over its adoption strongly suggest that the Senate was expected to play an active and independent role in determining who should sit on the Nation's judiciary.

Throughout its deliberations, the Convention contemplated that the National Legislature in some form or another would play a substantial role in the selection of Federal judges. As a matter of fact, on May 29, 1787, the Convention began its work on the Constitution by taking up the Virginia plan, which provided: That a National Judiciary be established...to be chosen by the National Legislature.

Under this plan, the President was to have no role at all. One week later, James Madison modified the proposal so that the power of appointing judges would be given exclusively to the Senate rather than to the legislature as a whole. This motion was adopted without any objection. So the Senate had the entire authority.

Then less than 2 weeks before the Convention's work was done, for the first time the committee's draft provided that the President should have a role in the selection of judges.

However, giving the President the power to nominate judges was not seen as ousting the Senate from a central role. Governor Morris of Pennsylvania paraphrased the new provision as one giving the Senate the power to appoint judges nominated to them by the President. In other words, it was considered the Senate was the nomination body and the President simply recommended judges to the Senate.

The Convention, having repeatedly and decisively rejected the idea that the President should have the exclusive power to select judges, could not possibly have intended to reduce the Senate to a rubber stamp, but rather it created a strong Senate role to protect the independence of the judiciary. In fact, Alexander Hamilton, considered the strongest defender of Presidential power, emphasized that the President would be required to have his choice for the bench submitted to an independent body for debate, a decision, and a vote, not simply an affirmation. He clarified the necessary involvement of the Senate in Federalist No. 77 by writing:

"If by influencing the President be meant restraining him, this is precisely what must have been intended."

Here is the emergence of a check, a balance, a leveling impact on the power of appointment, which is not to be unbridled.

In 1776, John Adams also wrote on the specific need for an independent judiciary and checks and balances. He said:

"The dignity and stability of government in all its branches, the morals of the people and every blessing of society, depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checked upon that...[The judges'] minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men."

So it is clear, when examining the creation of our Constitution, that the Federal judiciary was specifically designed to be an independent, nonpartisan third branch, and the Senate was meant to play an active role in the selection process.

In addition, the experience of President Washington in appointing judges illustrates that from the outset the Senate took an active role in evaluating judicial nominees. In 1795, President George Washington nominated John Rutledge to be Chief Justice. Soon after his nomination, Rutledge assailed the newly negotiated and popular Jay Treaty with Britain. Even as Rutledge functioned as Acting Chief Justice, the Senate debated his nomination for 5 months, and in December 1795 the body rejected him 14 to 10, illustrating from the first administration that the Senate has always enjoyed a strong prerogative to confirm or reject nominees.

Now, use of procedural delays throughout history has prevented nominees from receiving an up-or-down vote. The claim that it is unprecedented to filibuster judicial nominations is simply untrue. In 1881, Republicans held a majority of seats in the Senate but were unable to end a filibuster to preclude a floor vote on President Rutherford B. Hayes's nomination of Senator Stanley Matthews to the Supreme Court. Matthews was renominated by incoming President James Garfield, and after a bitter debate in the Senate, was confirmed by a vote of 24 to 23. This has been described as the first recorded instance in which the filibuster was clearly and unambiguously deployed to defeat a judicial nomination.

Then, as has been stated on the Senate floor, there was the 1968 GOP-led filibuster against President Lyndon B. Johnson's nomination of Abe Fortas to be Chief Justice of the United States. At the time, a page 1 Washington Post story declared: "Fortas Debate Opens With a Filibuster."

The article read:

A full-dress Republican-led filibuster broke out in the Senate yesterday against a motion to call up the nomination of Justice Abe Fortas for Chief Justice.

So here are two specific examples of Republican-led filibusters against judicial appointments.

Last Congress, the Congressional Research Service reported that filibusters and cloture votes have been required to end debate on numerous judicial appointments. CRS reported that since 1980, cloture motions have been filed on 14 court of appeals and district court nominations. We all know a cloture vote is another kind of filibuster. It is the kind of filibuster where one does not have to stand up on the floor, but it takes the same 60 votes to close off debate. Moreover, cloture petitions were necessary in 2000 to obtain votes on the nominations of both Richard Paez and Marsha Berzon to the Ninth Circuit after Republican opponents repeatedly delayed

action on them, for over 4 years in the case of Paez.

In fact, at the time, Republican Senator Bob Smith openly declared he was leading a filibuster against Richard Paez and he described Senator Sessions as a member of his filibuster coalition.

In addition to using the filibuster and other procedural delays, Republicans have publicly pronounced the importance of these rules and their own desire to delay or block the confirmation of judges. As recently as 1996, Senator Lott stated:

"The reason for the lack of action on the backlog of Clinton nominations was his steadily ringing office phone saying 'No more Clinton Federal judges.'"

In 1996, Senator Craig said:

"There is a general feeling...that no more nominations should move. I think you'll see a progressive shutdown.

In 1994, Senator Hatch stated that the filibuster is "one of the few tools that the minority has to protect itself and those the minority represents."

How soon they forget. Recent Republican practices using anonymous holds allowing a single Senator, not 41, to prevent a hearing or a vote on a judicial nominee, in effect, has created a filibuster of one. All told, during the last administration, more than 60 judicial nominees suffered this fate. This practice was recently commented on in the Chicago Tribune which said:

"In addition, there are lots of congressional practices that defy majority rule. Under President Clinton, when Republicans controlled the Senate, they didn't have to use the filibuster to bottle up judicial nominations. The Judiciary Committee simply refused to send them to the floor for a vote."

That is true. I know. I was there. Remembering this history is important, not to point fingers or justify a tit-for-tat policy; instead, it is important to recall that Senate rules have been used throughout our history by both parties to implement a strong Senate role and ensure that Presidents do not attempt to weaken the independence of the judiciary.

The history is not new, and these examples have been cited by my colleagues in other contexts, and therefore, those on the other side have responded to the history. I believe it is important to address the differences that the other side is trying to draw.

Some have argued that the nomination by President Hayes of Senator Matthews of Ohio was not a filibuster because there was no cloture vote. This is true, however, a procedural delay denying a nominee confirmation to a court still has the result blocking a nomination. Trying to make a distinction about the procedures used to deny a nominee confirmation is a distinction without a difference.

As for the nomination of Abe Fortas - colleagues on the other side of the aisle have made various arguments including: that's only one isolated example; it was a Supreme Court, not a Circuit Court nominee; or Fortas' nomination was withdrawn after a failed cloture vote showed he did not have majority support and therefore its not the same situation.

Miguel Estrada and Carolyn Kuhl both withdrew their nominations after failed cloture votes, however both were used as examples of filibusters by Democrats.

Our colleagues have argued that the delays to the nominations of Richard Paez and Marsha Bershon do not count because in the end they were confirmed. This ignores that it took over four years to confirm both nominees. In addition, if a party attempts to filibuster a nomination, or legislation, and it is eventually passed that does not mean it is not a filibuster. It simply means that the filibuster or refusal to grant cloture cannot be sustained. That has happened to both parties in a variety of situations. However, failure does not undo the effort.

Finally, as to the other Clinton Administration nominees - the response given is that their nominations weren't defeated by a cloture vote on the floor. In essence the argument is because different procedural rules were used to defeat a nomination, it doesn't count. On its face, this argument doesn't hold water. To the nominee whether their confirmation failed because of a "hold" in Committee, or a failed cloture vote, the result is the same - they are not sitting on the bench.

Dozens of Clinton's nominees were "pocket filibustered" by as little as one Senator who, in secret, prevented the nominees from receiving a hearing in Committee, or a mark-up, or a floor vote. One Senator without debate or reason has stopped many Clinton nominees.

The question I have is whether the public interest is better served by one hidden filibuster without explanation, or 41 Senators debating publicly and refusing publicly to confirm the nominee. Clearly, it is the later.

I would like to go over a few nominees from the last administration who have been filibustered by Republicans, and filibustered successfully on many occasions by as little a number as one Republican; filibustered in a way that it was secret; filibustered in a way that the individual never received a hearing or a markup in Judiciary or a vote on the Senate floor. Then I would like an answer to the question, which is better, a filibuster by 40 Members on the floor openly declared, publicly debating, discussing an individual's past speeches, an individual's temperament, character, opinions, or a filibuster in secret when one does not know who or why?

I begin with Clarence Sundram. Clarence Sundram was the chairman of the New York Commission for the Mentally Disabled. He was nominated on September 29, 1995. He had hearings on July 31, 1996, and June 25, 1997. There was no committee vote. There was no floor vote. He was simply killed in committee by a filibuster of one or two, or the chairman's decision not to bring the nomination to the floor. He was supported by both home State Senators Moynihan and D'Amato. On seven occasions, Senator Leahy spoke on the Senate floor urging that a vote be taken on Sundram, but no vote was ever taken.

James A. Beaty, Jr., was nominated to the U.S. Court of Appeals for the Fourth Circuit on December 22, 1995, and

renominated on January 7, 1997. He did not receive a hearing and was not voted on in committee. His nomination languished for more than 1,000 days; almost 3 years without any action being taken. He was nominated by President Clinton to be a judge on the U.S. District Court for the Middle District of North Carolina. He was confirmed by the Senate in 1994.

Before that, he spent 13 years as a judge in the North Carolina Superior Court. He was blocked by Senator Helms. On November 21, 1998, National Journal reported that Senator Helms wanted President Clinton to name to the Fourth Circuit one of the Senator's proteges, Terrence W. Boyle, whose nomination to that bench was killed when the Democrats ruled the Senate and George Bush was President, but the Clinton White House refused and Senator Helms made it clear that President Clinton would not get Beaty confirmed until he nominated Boyle.

Then Senator Helms supported Beaty when he was nominated for his current position as a U.S. district court judge. But this shows how things worked, where one person could deny a nomination.

Then there is Helene White from the State of Michigan. She was nominated to the U.S. Court of Appeals for the Sixth Circuit on January 7, 1997, and renominated on January 26, 1999, and renominated for a third time on January 3, 2001. She did not receive a hearing or a committee vote during the pendency of her nomination. She had waited for a Senate Judiciary Committee hearing for 4 years, longer than any other judicial nominee in history, according to the Associated Press. She had been a judge on the Michigan Court of Appeals. She served as a Wayne County circuit judge for nearly 10 years. She sat on the Common Pleas Court for the city of Detroit and served on the board of directors of the Michigan legal services. President Clinton thanked her for hanging in there through an ordeal that no one should have to endure. It is my understanding Senator Levin, one of the Michigan Senators, supported her. Senator Abraham waited 2 years before turning in his blue slip, and after turning in the blue slip did not endorse Ms. White. That, again, is how things worked. One person -- not 41 people on the floor debating, but 1 person in secret holding up a nominee. That is just as much a filibuster, and even more effective a filibuster.

Jorge Rangel was nominated to the U.S. Court of Appeals for the Fifth Circuit on July 24, 1997. He did not receive a hearing or a vote in committee. He was a partner in Rangel & Chriss, a Corpus Christi law firm, and specialized in personal injury, libel, and general media litigation. He was presiding judge of the 347th Circuit Court in Nueces County from October of 1983 to June of 1985, and a former assistant professor of law at the University of Houston. He was originally recommended to the White House by Senator Bob Krueger, but removed his name from consideration because, according to a July 25, 1997 Dallas Morning News article, he was then a member of the American Bar Association Panel that reviews federal court nominees, which made him ineligible. He was subsequently nominated after he was no longer on the ABA panel, at which time, Texas Monthly has reported, he was blocked by his two home state Senators. So, two persons there.

Barry Goode was nominated to the U.S. Court of Appeals for the Ninth Circuit in 1998, renominated January 26, 1999, and renominated a third time on January 3, 2001, just before President Clinton left office -- three tries. He waited for 2 1/2 years without a hearing or a vote in committee. He was a partner at the time at the San Francisco law firm of McCutchen, Doyle, Brown & Enersen. He had practiced law since 1974. He was an adjunct professor of environmental law at the University of San Francisco and served 2 years as special assistant to Senator Adlai E. Stevenson III. The ABA rated him as qualified. He was supported by both myself and Senator Boxer. The reason for the block was an anonymous Republican who, to this day, is not known. Senator Leahy spoke at least eight times on the Senate floor, urging that Goode's nomination be considered, but a filibuster of one, hidden, in secret, nobody knowing who it was, essentially killed this nomination.

Legrome Davis was nominated to the U.S. District Court for the Eastern District of Pennsylvania on July 30, 1998, and renominated on January 26, 1999. He did not receive a hearing or a vote from the Judiciary Committee during the nearly 2 1/2 years his nomination was pending. President Bush renominated Davis to the same court at Senator Specter's request on January 23,2002, and he was finally confirmed by a unanimous vote of the Senate on April 18, 2002. But the point was he was stopped for nearly 2 1/2 years by an unknown individual.

Lynnette Norton was nominated to the U.S. District Court for the Western District of Pennsylvania on April 29, 1998, and renominated on January 26, 1999. She did not receive a hearing or a vote in committee during the more than 2 1/2 years her nomination was pending. She died suddenly in March 2002 of a cerebral aneurysm. It is my understanding Senator Specter supported Norton. Senator Santorum, I believe, did not return the blue slip. According to a November 18, 1999 article in the Philadelphia Inquirer, a hold was placed on Ms. Norton’s nomination.

H. Alston Johnson was nominated to the U.S. Court of Appeals for the Fifth District on April 22, 1999, and renominated on January 4, 2001. Despite waiting over a year and a half, he did not receive a hearing or a vote in committee. His nomination was withdrawn by President Bush on March 19, 2001. He was supported by both home State Senators, Senators Breaux and Landrieu. According to articles in the Baton Rouge Advocate on July 10, 2000, and January 8, 2001, it is my understanding an individual Senator blocked his nomination from proceeding, even though both Republicans and Democrats appeared willing to confirm him.

James E. Duffy, Jr. was nominated to the U.S. Court of Appeals for the Ninth Circuit on June 17, 1999, and renominated on January 3, 2001. He did not receive a hearing or vote in committee. He is from Honolulu, had been a litigator for his entire legal career, been a partner in the Honolulu law firm of Fujiyama, Duffy, and Fujiyama since 1975. He was former president of both the Hawaii State Bar and the Hawaii Trial Lawyers Association. He would have been the first active Hawaii member of the

Ninth Circuit Court of Appeals in 15 years, despite rules that at least 1 judge must sit in each of the States within the Ninth Circuit. He was unanimously rated as well qualified. He was supported by both Hawaii Senators. There has been no explanation forthcoming of who blocked his progress. Again, a secret hold, one person. Two home State Senators supporting this individual and the individual does not go forward. That is as much a filibuster as anything going on on the floor at this time.

Elena Kagan was nominated to the U.S. District Court of Appeals for the District of Columbia on June 17, 1999. She did not receive a vote or a hearing in committee. She is currently the dean of Harvard Law School. She was a visiting professor at Harvard Law School, and a former domestic adviser to President Bill Clinton when she was nominated. She was special counsel to the Senate Judiciary Committee during the confirmation hearings of Ruth Bader Ginsburg. She served as Associate Counsel to the President from 1995 to 1996, and Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council from 1997 to 1999. Prior to that she was professor of law at the University of Chicago, tenured. She worked at the Washington, DC, law firm of Williams and Connolly, and she clerked for U.S. Supreme Court Justice Thurgood Marshall. A substantial majority of the ABA rated her qualified. A minority rated her well qualified. It is my understanding three Senators argued that the DC Circuit did not need any more judges, an argument that had been used to delay the confirmation of Judge Merrick Garland between 1995 and 1997.

See, this was another thing that was happening during that time. Let me just say it like it was. Vacancies on the DC Circuit -- a critical and important circuit because it reviews all of the administrative appeals -- were purposely kept open, preventing President Clinton from filling that circuit, thus leaving more openings for the next President. Here three Senators kept this very qualified and very distinguished nominee from receiving a vote or a hearing on the committee. Again, a secret, hidden filibuster.

And, nevertheless, Senate Republicans supported the nomination by President Bush of Miguel Estrada tot he same circuit court in 2002.

James Wynn was nominated to the U.S. Court of Appeals for the Fourth Circuit on August 5, 1999, and renominated on January 3, 2001. As you can see, President Clinton made one last try before he left office. He did not receive a hearing or a vote in committee. President Bush withdrew Judge Wynn's nomination on March 19, 2001. He was a judge on the North Carolina Court of Appeals and had previously served on the North Carolina Supreme Court. When nominated, he was a Navy reservist in the JAG corps of the U.S. Navy with the rank of captain. He served as the ABA's first African-American chair of the Appellate Judges Conference whose membership includes over 600 Federal and State appellate judges. He was on the board of governors of the American Judicature Society and was a vice president of the North Carolina Bar Association. He was an executive board member of the Uniform State Laws Commission and a drafter of the Revised Uniform Arbitration Act, Uniform Tort Apportionment Act, and proposed Genetic Discrimination Act. He was rated qualified by the ABA screening committee. Senator Edwards supported him. The Associated Press, on December 29, 2000, reported that Senator Helms blocked Judge Wynn. One person blocks a distinguished jurist, a filibuster of one, and not a word said.

Kathleen McCree-Lewis was nominated to the U.S. Court of Appeals for the Sixth Circuit Court on September 19, 1999, and renominated on January 3, 2001. She did not receive a hearing or a vote in committee during the more than a year her nomination was pending. She was a distinguished appellate attorney with Dykema Gossett, one of the largest law firms in Michigan. She had been active in the Michigan bar from 1996 to 1999. She chaired the rules advisory committee of the U.S. Court of Appeals for the Sixth Circuit. From 1992 to 1995, she cochaired the appellate practice committee of the ABA section of litigation. From 1987 to 1998, she was editor of the Sixth Circuit section of the Appellate Practice Journal and is a life member of the Sixth Circuit Judicial Conference. She was president of the American Academy of Appellate Lawyers. She would have been the first African-American woman to serve on the Sixth U.S. Circuit Court of Appeals. She was rated by the ABA as well qualified. On March 21, 2001, the Detroit Free Press reported that she was blocked by one of her home State Senators, namely Senator Abraham. Let me quote the Detroit Free Press. McCree-Lewis never "got a hearing in the Senate, thanks to Abraham's epic obstructionism."

Now on January 8, 2001, the Detroit Free Press reported:

"The Senate has been obscenely obstructionist in blocking President Bill Clinton's judicial nominations. Former Senator Spencer Abraham did nothing to help shepherd Michigan Court of Appeals Judge Helene White and Detroit attorney Kathleen McCree Lewis through the system."

Again, filibuster of one, in secret, with no floor debate.

Enrique Moreno was nominated to the U.S. District Court of Appeals for the Fifth Circuit on September 16, 1999, and renominated January 3, 2001.

He did not receive a hearing or a vote in committee. At the time of his nomination, Moreno had a longstanding and diverse legal practice in El Paso, working on both civil and criminal law. In the civil area, he represented both plaintiffs and defendants, representing both large business clients and also individuals, advocating their civil rights. In a survey of State judges, he was rated as one of the top trial attorneys in El Paso. A native of Chihuahua, he came to El Paso as a small child, son of a retired carpenter and a seamstress.

The ABA committee unanimously rated him as well qualified.

In November of 2000, Texas Monthly reported that he was blocked by both home State Senators, again without a hearing or a vote in the Judiciary Committee.

Allen Snyder was nominated to the U.S. Court of Appeals for the DC Circuit on September 22, 1999. He did receive a committee hearing on May 10, 2000. His nomination, though, was not voted on by the committee.

At the time of his nomination, he was a longtime partner and chairman of the litigation practice at the DC law firm Hogan & Hartson. At Hogan & Hartson, he represented Netscape Communications Corporation in the landmark Microsoft antitrust case.

He was a former law clerk to Chief Justice William Rehnquist. The ABA unanimously rated him well qualified. He served as chair of the Committee on Admissions and Grievances of the U.S. Court of Appeals for the District of Columbia, as secretary and executive committee member of the Board of Governors of the District of Columbia Bar, and on the board of the Washington Council of Lawyers.

It is my understanding his nomination was blocked by two Judiciary Committee Senators. No reason was given.

Kent Markus was nominated to the U.S. Court of Appeals for the Sixth Circuit on February 9, 2000. He did not receive a hearing or a vote in committee. He was the director of the Dave Thomas Center for Adoption Law and visiting professor at Capital University Law School at the time of his nomination. He served in numerous high-level legal positions within the Department of Justice, including counselor to the Attorney General, Deputy Chief of Staff for the Office of the Attorney General, and Acting Assistant Attorney General for the Office of Legislative Affairs.

He also served as first assistant attorney general and chief of staff for the Ohio Attorney General's Office.

His nomination was supported by 14 past presidents of the Ohio State Bar Association, including Democrats, Republicans, and Independents; more than 80 Ohio law school deans and professors; prominent Ohio Republicans; the National District Attorneys Association; and the National Fraternal Order of Police.

The ABA unanimously rated him as qualified.

Both Senators DeWine and Voinovich returned blue slips. He was blocked by one Senator -- a filibuster of one, all hidden, all quiet.

Bonnie Campbell was nominated to the U.S. Court of Appeals for the Eighth Circuit on March 2, 2000, and renominated on January 3, 2001. Her hearing was on May 25, 2000. The nomination was never voted on by the Judiciary Committee.

She served for 4 years as Iowa's Attorney General. She is the only woman to have held that office in her State, and she wrote what became a model statute on antistalking for States around the country.

She was selected by President Clinton in 1995 to head the Justice Department's newly created Violence Against Women Office. She emerged as a national leader for her work to bring victims' rights reforms to the country's criminal justice system.

In 1997, Time magazine named her one of the 25 most influential people in America. Praising her for bringing "rock-solid credibility" to her job, Time called Campbell the "force behind a grass-roots shift in the way Americans view the victims -- and perhaps more important, the perpetrators -- of crimes against women."

She oversaw a $1.6 billion program to provide resources to communities for training judges, prosecutors, and police. She was chosen to serve on the President's Interagency Council on Women, chaired by First Lady Hillary Rodham Clinton. She also headed the Justice Department's Working Group on Trafficking.

According to a statement given by Senator Leahy to the Judiciary Committee on January 22, 2004, she was blocked by a secret Republican hold from ever getting committee or Senate consideration. Apparently, just one Senator. She had a hearing, as I said, but she never had a vote.

Roger Gregory was nominated to the U.S. Court of Appeals for the Fourth Circuit on June 30, 2000, and was renominated on January 3, 2001. He was a recess appointee of President Clinton at the end of the 106th Congress. He did not receive a hearing or a vote.

On March 19, 2001, President Bush withdrew his nomination. He was subsequently renominated by President Bush on May 9, 2001, and confirmed July 20, 2001, by a 93-to-1 vote.

According to former Senator Chuck Robb, on October 3, 2000:

"Despite the well-documented need for another judge on this court, and despite Mr. Gregory's stellar qualifications, the Judiciary Committee has stubbornly refused to even grant Mr. Gregory the courtesy of a hearing."

I know Senator Warner supported this judge.

Again, this just goes to show that we are having a major flap because 41 people feel strongly, are willing to come to the floor, and willing to debate a nominee, and all of a sudden the world is going to come to an end, when for years and years and years one or two or three Members of the Senate could prevent a hearing or a markup in the Judiciary Committee or an individual even being brought to the floor.

Which would the public prefer? I would hope it would be a discussion on the floor of the Senate. I would hope it would be laying out the case against the individual, as has been done with every one of the ten -- only ten; in all of President Bush's terms, only ten -- when in President Clinton's term there were 60, and one or two, in secret, kept that individual from being brought to the floor of the Senate and voted on.

Well, let me continue. John Bingler was nominated to the U.S. District Court for the Western District of Pennsylvania on July 21, 1995, and renominated on July 31, 1997. He did not receive a hearing or a vote either time he was nominated.

After waiting more than 2 years without any action on his nomination, he withdrew on February 12, 1998.

Since 1971, he has practiced law with the Pittsburgh firm of Thorp, Reed & Armstrong. He served for 6 years as chair of the firm's litigation department.

From 1970 to 1971, he was the public safety director for the city of Pittsburgh. He served for 3 years as an assistant U.S. attorney in Pittsburgh where he prosecuted Federal criminal cases, and for 2 years he was an attorney for the Civil Rights Division of the Department of Justice. He served a 3-year tour of duty in the U.S. Navy. He was rated unanimously as well qualified by the ABA.

On October 16, 1997, the Pittsburgh-Post Gazette reported that one of the two home State Senators held up his nomination for 2 years, allowing neither a hearing nor a vote, and I do not believe it was the chairman of the committee.

Bruce Greer was nominated to the U.S. District Court for the Southern District of Florida on August 1, 1995. He did not receive a hearing and he was never voted on by the committee. His nomination was withdrawn on May 13, 1996. At the time of his nomination, he was the president of the Miami law firm of Greer, Homer & Bonner, where he has a civil litigation practice.

Senator Bob Graham supported him. Senator Connie Mack's position is not known. It is my understanding the Wall Street Journal published a lengthy editorial on July 17, 1996, that made no direct allegations against Greer, but made a case for guilt by association implying that, because Mr. Greer represented certain defendants, he was soft on crime.

The Columbia Journalism Review reported that the day after the editorial appeared, the chairman came to the floor to denounce judges who are soft on crime and, shortly afterward, Mr. Greer received word that he would not be receiving a hearing. So Bruce Greer was denied even a hearing to see if the allegations were true.

That is what has happened, ladies and gentlemen.

Leland Shurin was nominated to the U.S. District Court for the Western District of Missouri on April 4, 1995. He did not receive a hearing and was never voted on in committee. His nomination was withdrawn at his request, because of inaction, on September 5, 1995.

He was an executive committee member and partner at the law firm of McDowell, Rice & Smith, in Kansas City, where he maintained a general practice doing plaintiff and defense litigation. He was very active in the community.

He was rated as qualified by the ABA committee. He told the Kansas City Star:

> I have the sense that my confirmation is being delayed. No one could give me a clear date when anything could be done. I've sat around for two years. I can't keep doing it.

One has to come to grips with whether this was a fair process, whether this was even as fair as what is happening today. I believe no way, no how was this a fair process. I have been one who has believed that the blue ship should be done away with, that there should be no anonymous holds, and that every appointee should be given a hearing and a vote in the committee. That does not mean that we should change the rules of the Senate to prevent, in extreme cases, the ability of the minority to register a strong point of view, when the minority of one has historically been allowed to register a strong point of view secretly and, in fact, kill a nominee.

Sue Ellen Myerscough was nominated to the U.S. District Court for the Central District of Illinois on October 11, 1995. She did not receive a hearing or a vote in committee. She was an Illinois State circuit court judge. She was an associate circuit court judge. She worked in law firms in Springfield. She formerly clerked for U.S. District Judge Harold Baker. A substantial majority of the ABA committee rated her as well qualified, while a minority rated her as qualified.

She was supported by both Senator Paul Simon and Senator Carol Moseley-Braun at the time. In 1997, Senator Dick Durbin stated in the State Journal-Register that he believed "Judge Myerscough was caught up in a Federal stall."

On September 27, 1996, the State Journal-Register reported that Senator Simon said he believed the reason was a matter of partisanship, not because of any controversy or problems with her qualifications. Senator Simon said he escorted Myerscough for individual meetings with Senator Hatch and other members of the panel but had "not had a single member of the committee tell me he or she couldn't vote for her."

This is what has happened. So I have a hard time understanding why we are where we are today.

Charles Stack was nominated to the U.S. Court of Appeals for the Eleventh Circuit on October 27, 1995. He received a hearing before the committee on February 28, 1996, but did not receive a vote in committee.

According to the May 11, 1996, Miami Herald, he came under intense attack from then-Presidential candidate Bob Dole, and he withdrew his nomination on May 13, 1996.

Cheryl Wattley, nominated to the U.S. District Court for the Northern District of Texas on December 12, 1995, did not receive a hearing or vote in committee. The Dallas Morning News reported in 1996 that she was supported by both home State Senators. Again, no reason, probably filibustered because one or two or three didn't like her for one reason or another.

Michael Schattman, nominated to the U.S. District Court for the Northern District of Texas, December 19, 1995, and renominated on March 21, 1997, did not receive a hearing, was not voted on in committee. His nomination at his request was withdrawn on July 1998 after 2 1/2 years of inaction by the committee. This man was a Texas State district court judge in Fort Worth. He had previously been a county court judge. And to add insult to injury, because of the lengthy delay in the nomination process, the February 11, 1998 edition of the NewsHour with Jim Lehrer reported that he lost his State court judgeship. He was unanimously rated as qualified. Again, this is the hidden filibuster of this body.

J. Rich Leonard, was nominated to the U.S. Court of Appeals for the Fourth Circuit, on December 22, 1995, did not receive a hearing or a vote in committee. Subsequently, he was nominated to the District Court for the Eastern District of North Carolina on March 24, 1999. Again, he did not receive a hearing or a vote. In total, this gentleman waited over 2.5 years before the committee for the two nominations without ever receiving a hearing or a vote. He was a judge on the U.S. Bankruptcy Court for the Eastern District of North Carolina at the time of his nomination by President Clinton. He was rated as well qualified. Again, my information is that one Senator blocked both of his nominations.

I see there are others waiting. I will be brief. But let me list some of the others.

Robert Freedberg, nominated to the U.S. District Court for the Eastern District of Pennsylvania, April 23, 1998. He never received a hearing. He was a judge on Northampton County's Court of Common Pleas. He is a former prosecutor. The January 28, 1999 Allentown Morning Call reported that he was blocked by one Senator.

Robert Raymar, nominated to the U.S. Court of Appeals for the Third Circuit, did not receive a hearing. His nomination expired at the end of the session. Former deputy attorney general for the State of New Jersey, member of the New Jersey Executive Commission on Ethical Standards. He was rated as qualified. He was supported by both State Senators. One person filibustered this individual in committee. He didn't receive a hearing or a vote.

James Lyons, nominated to the U.S. Court of Appeals for the Tenth Circuit, did not receive a hearing or a vote, withdrew after it became clear he would not receive a hearing or a vote. He was a longtime senior trial partner at the Denver law firm of Rothberger, Johnson & Lyons, special advisor to the President of the United States and the Secretary of State for economic initiatives in Ireland and Northern Ireland. He couldn't get a hearing. He was adjudged well qualified by the ABA.

I don't see where anybody is concerned about these injustices, and that is what they were -- real injustices.

John Snodgrass, nominated U.S. District Court, Northern District of Alabama, September 22, 1994, renominated January 11, 1995. He did not receive a hearing or a committee vote. His nomination was withdrawn on September 5, 1995.

Anabelle Rodriguez was nominated to U.S. District Court for the District of Puerto Rico, January 26, 1996, renominated March 21, 1997. A committee hearing was held on October 1 of 1998, but a vote was never held on her nomination during the nearly 3 years her nomination was pending. What were the reasons for this block? On October 8, 1998, the Associated Press reported that her supporters said she was opposed by Puerto Rico's prostatehood Governor and congressional representative because she is a backer of the island's current status as a U.S. commonwealth, and there was apparently some overwhelming bipartisan opposition.

Why not vote? If what is being said now has been true and par for the course, why not vote?

Lynne Lasry was nominated for the Southern District of California, did not receive a hearing or a vote. After one year of inaction, the nomination was withdrawn in 1998.

James Klein was nominated to the U.S. District Court for the District of Columbia, January 27, 1998, renominated March 25, 1999, and did not receive a hearing or committee vote during 3 years that he was pending.

Patricia Coan was nominated to the U.S. District Court for the District of Colorado, May 27, 1999. She did not receive a hearing or committee vote in the year and a half that her nomination was pending. The May 21, 2000 Denver Post reported that one Senator blocked her nomination.

Dolly Gee was nominated to the District Court for the Central District of California, May 22, 1999. She did not receive a hearing or committee vote in the year and a half that her nomination was pending.

Fred Woocher was nominated to the U.S. District Court for the Central District of California, received a hearing on November 10, 1999, was not voted on by the committee despite waiting for a year after his hearing.

Steven Bell was nominated to the U.S. District Court for the Northern District of Ohio, did not receive a hearing or vote in committee for more than a year that his nomination was pending.

Rhonda Fields was nominated to District Court for the District of Columbia on November 17, 1999, no hearing, no vote.

Robert Cindrich was nominated to the U.S. Court of Appeals, Third Circuit, February 9, 2000, no hearing, no vote.

David Fineman was nominated to the U.S. District for the Eastern District of Pennsylvania on March 9, 2000, no hearing, no vote.

Linda Riegle was nominated to the U.S. District for the District of Nevada on April 25, 2000, no hearing, no vote in committee.

Ricardo Morado was nominated to the U.S. District for the Southern District of Texas on May 11, 2000, no hearing, no vote.

Stephen Orlofsky was nominated to the U.S. Court of Appeals, Third Circuit, May 25, 2000, no hearing, no vote.

Gary Sebelius was nominated to the U.S. District for the District of Kansas on June 6, 2000, no hearing, no vote.

Kenneth Simon was nominated to the U.S. District for the Northern District of Alabama on June 6, 2000, no hearing, no vote.

John S. W. Lim was nominated to the U.S. District for the District of Hawaii on June 8, 2000, no hearing, no vote.

And there are those, you might say, that came under the Thurmond rule. There is sort of an informal practice that in the last few months of a President's tenure, the

hearings do not go forward. Again, that is not a rule; it is a practice.

Christine Arguello, nominated to the U.S. Court of Appeals, Tenth Circuit, on July 27, 2000.

Andre Davis, nominated to the U.S. Court of Appeals, Fourth Circuit, on October 6, 2000.

Elizabeth Gibson, nominated to the U.S. Court of Appeals, Fourth Circuit, on October 26, 2000.

David Cercone, nominated to the U.S. District Court for the Western District of Pennsylvania on July 27, 2000.

Harry Litman, nominated to the U.S. District Court for the Western District of Pennsylvania on July 27, 2000.

Valerie Couch, nominated to the U.S. District Court for the Western District of Oklahoma on September 7, 2000.

Marian Johnston, nominated to the U.S. District Court for the Eastern District of California on September 7, 2000.

Steve Achelpohl, nominated to the U.S. District Court for the District of Nebraska on September 12, 2000.

Richard Anderson nominated to the U.S. District Court for the District of Montana on September 13, 2000.

Stephen Lieberman, nominated to the U.S. District Court for the Eastern District of Pennsylvania on September 14, 2000.

And, Melvin Hall, nominated to the U.S. District Court for the Western District of Oklahoma on October 3, 2000.

What I have tried to show today is that there is a certain amount of hypocrisy in what is going on today. The opposition cannot have any concern about one Clinton nominee or dozens of Clinton nominees who received no hearing, no markup, no floor vote, but suddenly they are upset because 41 of us in public, eight of us in committee, vote no and believe that our views were strong enough and substantive enough to warrant a debate on the floor of the Senate in the true tradition of the Senate. And bingo, we are going to have a change in the rules to prevent that from happening. Nobody is talking about changing the rules so one person can't filibuster; one person can't, on a pique or because they don't like the individual, condemn that individual.

I can tell you, because I have been on this committee for 12 years, I have had people call me and say: Look, I have three children. I have to know what is going to happen to me. I try to get information, can't get that information.

I ask the majority of this body, is that fair? Do you not feel aggrieved? Or is that OK because it was a different President of a different party? I don't think so. I think what is sauce for the goose is sauce for the gander. I pointed out two uses of filibusters for judicial appointments by Republicans, one in 1881 and one in 1968.

During the reorganization of the Senate in 2000, Senators Daschle and Leahy worked to make the nominations process more fair and public. This refining forced Senators opposed to a nomination to be held accountable for their positions. They could not hide behind a cloak of secrecy. This step also wiped out many of the procedural hurdles that have been used to defeat nominations. So many of the tools used by Republicans in the past, and referred to as a way to draw distinctions with a public cloture vote are no longer available. This historical record is important, yet it is too often lost in our debates.

I also believe it is useful to examine the current state of judicial nominations, and what has actually occurred in this body during President Bush's tenure: 208 Judges Confirmed out of 218; 95 percent of President Bush's judges have been confirmed; the Senate has confirmed 35 circuit court nominees; recently, the Judiciary Committee reported out 2 District Court and 1 Circuit Court nominees; today, there are only 4 judicial nominations on the Senate calendar waiting for a vote; and there are only 45 total vacancies, both district and circuit courts, and 29 do not have nominations submitted.

What do these numbers mean? There are more judges today sitting on the federal bench than in any previous presidency. The Senate has confirmed more judges for President Bush than in President Reagan's first term, his father's only term, or President Clinton's second term.

The Senate confirmed more circuit court judicial nominees than in Reagan's or Clinton's first term. When Democrats were in the majority in 2001, there were 110 vacancies and by the end of the 108th Congress and President Bush's first term, the number had plummeted to 27 - the lowest level of vacancies since the Reagan era.

Of the 8 nominees reported out of committee this year, four have already been confirmed. One, Thomas Griffith, is waiting a vote, and the remaining three are controversial nominees who were defeated last Congress: William Myers, Priscilla Owen, and Janice Rogers Brown.

In addition, President Bush has sent the Senate but one new judicial nomination this year. Brian Sandoval of Nevada is the only new judicial nomination sent to the Senate in the first five months of this year. He has bipartisan support from his home State Senators and appears to be a consensus nominee.

Again, what do these numbers mean? They mean there is no crisis on the federal bench that justifies the so-called nuclear option as some of my Republican colleagues contend.

To me, the record I just described and the reasons for opposing these limited number of nominees doesn't lead to the conclusion that the Senate should be discussing breaking our own institutional rules and unraveling the checks and balances established by our Constitution.

Some have described this debate as a strategy to change the rules. Changing the rules is not only unacceptable, but in this case it is inaccurate as well. The nuclear option is a strategy to break the rules. This isn't just my assessment; it's the conclusion drawn by the Senate Parliamentarian and the Congressional Research Service.

Last week, press reports reiterated that Senator Reid had been assured by the Parliamentarian that if the Republicans go through with this strategy they would "have to overrule him, because what they are doing is wrong."

The Congressional Research Service concluded in a recent report that to employ these tactics the Senate would have to "overturn previous precedent." "Proceedings of this kind, it is argued, would both break old precedent and establish new Senate precedents… Eventually such a plan might even result in changes in Senate rules, while circumventing the procedures prescribed by Senate rules."

So, shortly, the Senate will likely be faced with a preemptive strike to break the rules. The term preemptive strike seems appropriate when there are only three controversial judges waiting for a vote - judges who were previously defeated last Congress and have drawn strong opposition.

This is a move to wipe out 200 years of precedent when this Senate has only been in session for just over 4 months, when this President has had over 200 judges confirmed, and when the Judiciary Committee reported favorably a controversial circuit court judge who was not voted on last Congress, but was renominated. This appears to me to be an escalation that is unwarranted in the reality of what has actually occurred and is happening in this session.

I find it ironic that while our country fights abroad to establish democracy, to promote checks and balances, and institute wide representation of all people in government; here at home our leadership is attempting to erode those very protections in our own government. What kind of message are we sending? "Do as I say, not as I do?"

This debate over judicial nominees is a debate about privacy, women's rights, civil rights, clean environment, access to healthcare and education; retirement security - we may not all agree, but the beauty of our country is the freedom to disagree, to debate, and to require compromise because no one party has the corner on the market of good ideas and solutions - and no party has the corner on the market of political power.

Democrats held the House majority for over 50 years, and now Republicans have been in the majority for over a decade. Democrats held the White House for eight years, now the Republicans will have occupied the White House for eight years. Neither party will always be right when it comes to the best policies for our country, and neither party will always be in power.

There are many urgent problems the Senate needs to be focused on and Americans' want us to focus on: the war in Iraq; protecting our homeland; addressing the high cost of prescription drugs; alleviating rising gas prices; ensuring our social security system is stable and working; and reducing the federal deficit.

I am troubled that instead today we are spending much of our time on political posturing gone too far - on a strategy to unravel our constitutional checks and balances.

Cold war commentator Walter Lippman once said, "In making the great experiment of governing people by consent rather than by coercion, it is not sufficient that the party in power should have a majority. It is just as necessary that the party in power should never outrage the minority." And today, we are outraged.

I would hope that the majority would not choose to unravel that foundation over a small handful of nominees. I would hope we would continue to honor the tradition of our democracy. I would hope the President will urge others in his party to walk away from this nuclear strategy. And I know if the shoe was on the other foot, I would not advocate breaking Senate rules and precedent.

Regardless of how this debate continues to unfold, I remain committed to evaluating each candidate on a case by case basis, and I will continue to ensure that judicial nominees are treated fairly and even-handedly, but I will not fail to raise concerns or objections when there are legitimate issues that need to be discussed.

I thank the Chair and yield the floor.